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CHARLES ELIOT NEWBURY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 725

MOLLIE NETCHER NEWBURY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND BRIEF IN SUPPORT
THEREOF.

LLEWELLYN A. LUCE,
Counsel for Petitioner.



INDEX

SUBJECT INDEX

	Page
Petition for writ of certiorari.....	1
Opinion below.....	1
Jurisdiction.....	2
Statute and regulations involved (See appendix).....	2
Question presented.....	2
Statement.....	2
Specification of errors to be urged.....	5
Reasons for granting the writ.....	6
Brief in support of petition.....	10
I. Legislative history of section 23(1).....	10
II. The nature of petitioner's interest in the properties of the trust estate.....	12
III. The case involves important question of federal tax law.....	14
Appendix—Statute and regulations involved.....	16

TABLE OF CASES CITED

<i>Carol v. Commissioner</i> , 30 B. T. A. 443.....	7,8
<i>Chisholm v. United States</i> , 85 Ct. Cl. 199, 19 F. Supp. 274.....	7,9,14
<i>Commissioner v. Gutman</i> , 143 F. 2d 201.....	7,9,14
<i>Commissioner of Netcher</i> , 143 F. 2d 484.....	13
<i>Becker v. Becker</i> , 206 Ill. 53.....	13
<i>Drager v. McIntosh</i> , 316 Ill. 368, 38 N. E. 1029.....	13
<i>Freuler v. Helvering</i> , 291 U. S. 35, 54 Sup. Ct. 308.....	7,9,14
<i>Helvering v. Falk</i> , 291 U. S. 183, 54 Sup. Ct. 353.....	7,9,14
<i>Melies v. Beatty</i> , 313 Ill. 418, 145 N. E. 146.....	13
<i>Strawbridge v. Strawbridge</i> , 220 Ill. 61, 77 N. E. 78.....	13

STATUTES CITED

Act of February 13, 1925, section 3(b).....	1
Jones Illinois Statutes Annotated, Vol. 27, section 29.14.....	13
Revenue Act of 1928, see, 23(k), c. 852, 45 Stat. 791.....	8,10
Revenue Acts of 1934 and 1936, Section 23(1).....	1,5,6

OTHER AUTHORITIES CITED	Page
House Conference Report No. 1882, 70th Cong., 1st Sess. pp. 11-12 (1939-1 Cu. Bull. (Part 2) 444, 445).	8, 11
Senate Report No. 960, 70th Cong., 1st Sess., p. 20 (1939-1 Cum. Bull. (Part 2) 409, 422-423).....	8, 10
Treasury Regulations 86 and 94, Article 23(1).....	6

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**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS OF THE UNITED STATES
AND BRIEF IN SUPPORT THEREOF.**

To the Honorable the Supreme Court of the United States:

Mollie Netcher Newbury, an individual, by her attorney, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered October 2, 1944, dismissing her petition for the recovery from the United States of \$45,451.34, with interest, on account of the overpayment of Federal income taxes for the years 1935, 1936 and 1937.

Opinion Below

The special findings of fact, conclusions of law and opinion of the Court of Claims (R. 26-42) are unreported but may

be found at Paragraph 62,726, Volume 4, 1944, Edition of Prentice-Hall Federal Tax Service.

Jurisdiction

The judgment of the Court of Claims was entered October 2, 1944. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

Statute and Regulations Involved

The pertinent statute and regulations involved in this case are presented in the Appendix, infra, pp. 16-17.

Question Presented

The petitioner is the owner of a one-third interest in the annual net income of the Trust Estate of Charles Netcher, deceased, and the owner of a one-third *remainder interest* in the corpus of the trust property.

The question presented is whether under Section 23(1) of the Revenue Acts of 1934 and 1936, the taxpayer is entitled to deduct from her individual gross income one-third of the depreciation sustained by the properties of the trust estate or whether the depreciation deduction is allowable only to the trustee of the Estate.

Statement

The Court of Claims made a Special Findings of Fact (R. 26-33) which may be summarized as follows:

The taxpayer is a citizen and resident of Cook County, Illinois. Charles Netcher, the former husband of the plaintiff, died June 19, 1904, leaving a will which provided in part as follows:

SECOND: All the rest, residue and remainder of my Estate of whatever nature and wherever situate, I

give, bequeath and devise to my said wife, Mollie Netcher, in trust (in this will otherwise described as the Principal Trust Estate) for the uses and purposes following, to wit:

(a) One-third of the entire net income of said Principal Trust Estate shall be paid over by said trustee, annually or oftener as to said trustee shall seem fit, and as the said income accrues, until the termination of this trust as hereinafter provided, to my said wife, Mollie Netcher, during her life and after her death until the termination of this trust to such person, persons, corporation or corporations and for such purposes as my said wife may by deed or will direct. * * *

(b) The remaining two-thirds of the entire net income of said Principal Trust Estate, shall be divided by said Trustee annually or oftener as to said Trustee shall seem fit, and as said income accrues, until the termination of this trust, as hereinafter provided, into equal shares, one such share to be thereafter held in trust by said trustee as a Separate Trust Fund for each of my children, now or hereafter born to me, who is living at the time of my death or who has died before my death leaving a widow, or child or children living at the time of my death. Each such Separate Trust Fund shall be subject to the provisions, limitations and conditions hereinafter provided with respect to the same. * * *

Charles Netcher was survived by his wife, the taxpayer and petitioner herein, who has since married Mr. Saul Newbury, and by four children. The taxpayer is known as "Mollie Netcher Newbury".

Under the will of the decedent, the taxpayer, during the years 1935, 1936 and 1937, acted as Trustee of the properties of the Estate and was the owner in her individual capacity of a one-third interest in the annual net income of the trust and a one-third remainder interest in the trust corpus. She filed, as trustee, fiduciary Federal in-

come tax returns on Form 1041 for the trust estate for each of the years involved, 1935, 1936 and 1937.

The petitioner also filed individual Federal income tax returns for the years 1935, 1936 and 1937 in which she deducted \$47,623 for 1935, \$47,623 for 1936 and \$45,434.71 for 1937, representing her one-third share of the depreciation sustained by the properties of the trust estate.

The Commissioner of Internal Revenue determined that all deductions for depreciation on the properties of the Trust Estate were allowable only to the Trustee of the Trust Estate and that the petitioner herein, although the owner of a one-third interest in the net annual income from the estate and the owner of a one-third remainder interest in the trust corpus, was not entitled to any deductions, in her individual capacity, for depreciation on the assets of the trust estate. The Commissioner disallowed the deductions for depreciation taken by the taxpayer on her individual tax returns for the years 1935, 1936 and 1937 and assessed additional income taxes against her amounting to \$12,738.79 for 1935, \$12,780.36 for 1936 and \$12,489 for 1937. The petitioner paid the additional taxes plus interest and filed timely claims for refund to recover the additional taxes and interest paid for each year. The taxpayer's claims for refund were rejected by the Commissioner and she filed a petition in the Court of Claims of the United States to recover the additional taxes and interest paid.

The petitioner urged before the Court of Claims that as the owner of a one-third interest in the annual net income from the trust properties and a one-third remainder interest in the trust corpus she was entitled under Section 23(1) of the Revenue Acts of 1934 and 1936 to deduct from her individual gross income one-third of the depreciation sustained by the properties of the trust estate.

The Court of Claims dismissed the taxpayer's petition on the ground that under Section 23(1) of the Revenue Acts of 1934 and 1936 the petitioner was not individually entitled to any deductions for depreciation on the assets of the trust estate and that deductions for depreciation were allowable only to the Trustee:

Specification of Errors To Be Urged

The court below erred:

1. In deciding that the Trustee of the Trust Estate was entitled to all deductions for depreciation on the properties of the estate, thus excluding the petitioner from any depreciation allowances even though she was the owner of a one-third interest in the annual net income of the trust and the owner of a one-third remainder interest in the trust corpus.
2. In failing to hold and decide that the petitioner, as the owner of a one-third interest in the annual net income of the trust and the owner of a one-third remainder interest in the trust corpus, was entitled to deduct from her gross income for the years 1935, 1936 and 1937 one-third of the depreciation sustained by the trust properties in each of those years.
3. By failing to hold and decide that the petitioner was the owner of an equitable fee interest in one-third of the trust properties and as a fee owner was expressly entitled under Section 23(1) of the Revenue Acts of 1934 and 1936 to deduct from her individual gross income one-third of the depreciation sustained by the trust properties during the years 1935, 1936 and 1937.
4. By failing to hold and decide that the petitioner had a far greater interest in the trust properties than that of a

mere life tenant and was therefore entitled under Section 23(1) of the Revenue Acts of 1934 and 1936 to deduct from her gross income one-third of the depreciation sustained by the trust properties during the years 1935, 1936 and 1937.

5. By regarding the petitioner's interest in the trust properties as that of a mere life beneficiary without a remainder interest and thus deciding that petitioner was not entitled under Section 23(1) of the Revenue Acts of 1934 and 1936 to deduct from individual gross income any share of the depreciation sustained by the properties of the trust.

6. In its conclusion of law that the petition of the taxpayer should be dismissed.

7. In rendering judgment for the defendant below and in failing to render a judgment that petitioner was entitled to recover from the defendant the sum of \$45,451.34, plus statutory interest thereon, for overpayment of her Federal income taxes for the years 1935, 1936 and 1937.

Reasons for Granting the Writ

1. The Court of Claims has decided an important question of Federal tax law, which has not been, but should be, settled by this Honorable Court.

Section 23(1) of the Revenue Acts of 1934 and 1936 (App. p. 16) provides that in the case of property held by one person for life with remainder to another person, the deduction for depreciation " * * * " shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. " * * * " Article 23(1) of Treasury Regulations 86 and 94 (App. pp. 16-17), in interpreting the statute, provides that the deduction for depreciation shall be computed as if the life tenant were the

absolute owner of the property "so that he will be entitled to the deduction during his life, and thereafter the deduction, if any, will be allowed to the remainderman."

Here the petitioner had a far greater interest in the properties of the trust estate than a mere life tenant. The Court of Claims held in its opinion (R. 34) that petitioner had a one-third interest in the annual net income of the trust and a one-third *remainder interest* in the *trust corpus*. She had a life estate plus a remainder interest in the trust corpus which, under the decisions of the courts of the State of Illinois, where the properties are located, constitutes a fee interest.

The court below has placed an entirely new interpretation upon Section 23(1) of the Revenue Acts by holding thereunder that the holder of a fee interest in property is not entitled to a deduction for depreciation whereas the statute definitely and clearly gives the deduction to a mere life tenant. We think that the decision of the court below does not properly interpret the plain language of the statute, the Treasury Regulations and the intent of Congress in enacting Section 23(1) of the Revenue Acts, as shown by the Congressional Committee reports.

Counsel can find no ruling or decided case in which it has been held that the owner of a fee interest in property or the owner of an interest greater than that of a life tenant is not entitled to a deduction for depreciation.

In a substantial number of cases it has been held that a mere life beneficiary is entitled to depreciation and depletion deductions. *Freuler v. Helvering*, 291 U. S. 35, 41; *Helvering v. Falk et al.*, 291 U. S. 183, 186; *Chisholm v. United States*, 85 Ct. Cl. 199, 19 F. Supp. 274; *Commissioner v. Edna C. Gutman* (C. C. A. 2), 143 F. (2d) 201, affirming *Edna C. Gutman v. Commissioner*, 1 Tax Court 365; *Sue Carol v. Commissioner*, 30 B. T. A. 443.

The question here involved is of the greatest importance and interest to all trust beneficiaries and the owners of interests in trust property. The court's decision, depriving the holder of an interest greater than that of a life tenant, from depreciation deductions is of far reaching effect. In fact, the importance of the question involved was stressed by Judge Madden in his concurring opinion (R. 40) when he said, in referring to the statute: "If it does mean what I have suggested, it is of great importance since, probably, a large proportion of trust instruments are silent on the question of setting up depreciation reserves".

Also, the learned judges of the court below, although agreeing in the decision promulgated, disagreed as to the reasons for reaching their conclusion.

2. The petitioner, as the owner of a fee interest in one-third of the properties of the estate (life estate plus remainder interest) is, we think, entitled under the plain language and intent of the statute to deduct from her gross income one-third of the depreciation sustained by the properties of the estate.

Section 23(1) of the Revenue Acts of 1934 and 1936 was first enacted as Section 23(k) of the Revenue Act of 1928. Section 23(k) of the 1928 Act was enacted by Congress for the relief of life beneficiaries and life tenants. (Senate Report No. 960, 70th Cong., 1st Sess., p. 20; House Conference Report No. 1882, 70th Cong., 1st Sess., pp. 11-12; *Carol v. Commissioner*, 30 B. T. A. 443.)

The pertinent section of the statute has been construed by the Court of Claims not as a relief measure, but as statutory authority for depriving a fee owner from depreciation deductions. The decision of the court below denies to the owner of a life estate, plus a remainder interest, the deduction which the statute grants unto a mere life tenant.

3. The decision of the Court of Claims conflicts in principle with the following cases, holding that a mere life beneficiary is entitled to the depreciation deduction:

Freuler v. Helvering, 291 U. S. 35, 54 S. Ct. 308;

Helvering v. Falk, 291 U. S. 183, 54 S. Ct. 353;

Commissioner v. Edna C. Gutman (C. C. A. 2), 143 F. (2d) 201, affirming *Edna C. Gutman v. Commissioner*, 1 Tax Court 365.

We think that the decision of the court below is not in accord with its own decision in *Chisholm v. United States*, 85 Ct. Cl. 199, 19 Fed. Supp. 274.

In the foregoing cases mere life beneficiaries were held to be properly entitled to depreciation deductions. In the instant case the owner of a life estate, plus a remainder interest, has been denied the deduction.

Counsel for petitioner certifies that in his opinion this petition is well founded and is not interposed for delay.

It is respectfully submitted that this petition should be granted.

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